

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: December 29, 2005

TO : Joseph Norelli, Regional Director  
Region 20

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Roger Hughes Drywall 512-5009  
Cases 20-CA-32635, et al. 512-5009-3300  
512-5009-6700  
512-6733-3300  
512-6733-6700  
512-5009-6767

These Section 8(a)(1) cases attack the Employer's state court lawsuit, which alleges that the Charging Parties, during area standards picketing and handbilling, committed malicious libel and related torts by distributing a handbill which stated that the Employer's owner had engaged in unlawful lewd conduct. The cases were submitted for advice as to whether the suit was baseless and retaliatory under Bill Johnson's Restaurants.<sup>1</sup> We conclude that the Region should dismiss the charges, absent withdrawal, because the suit was reasonably based and also not filed in retaliation against Section 7 conduct, but rather against conduct not protected by the Act. We further conclude that the allegation in the Employer's suit, that the Employer owner had not engaged in unlawful lewd conduct but had only simulated a lewd gesture, was not an unlawful collateral attack on a prior Board decision involving these parties. The Board decision relied upon a finding of Employer lewd conduct in front of the picketers as "buttressing" evidence of retaliatory motive against the picketing. Since the state court's implicit finding of simulated lewd conduct in front of the picketers is essentially the same "buttressing" evidence of that retaliatory motive, the state court suit is neither inconsistent with, nor a collateral attack on, the Board case.

### SYNOPSIS OF THE RELEVANT LITIGATION

This case arises from an apparent factual conflict between a Board decision and a subsequent state court lawsuit. The Board case<sup>2</sup> involved, inter alia, threatening and causing the arrest of an area standards picketer which

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<sup>1</sup> Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

<sup>2</sup> Roger D. Hughes Drywall (Roger Hughes I), 344 NLRB No. 49 (2005).

the Board found unlawful as retaliatory against the area standards picketing. In finding the unlawful retaliatory motive, the Board relied upon the Employer owner Roger Hughes' animosity against the picketers which the Board found was demonstrated, in part, by the fact that Hughes had lewdly exposed himself to the picketers. After the alleged lewd exposure, the Union circulated a handbill quoting from the police report filed against Hughes. Hughes filed a state court suit attacking that handbill as malicious libel, and alleging that he had only simulated lewd conduct. The jury found for Hughes and awarded \$1.5 million in actual and punitive damages.

An apparent conflict exists between the two cases because the Board case found that Hughes had lewdly exposed himself but the state court jury implicitly found that he had not. The Union filed this charge alleging that the Board's prior factual finding makes the subsequent state court suit unlawful under principles of collateral estoppel or res judicata.

#### **FACTS**

In November 2001, Carpenters Local 751 (Union) commenced area standards picketing as part of an ongoing labor dispute with Roger Hughes Drywall (Employer). On March 22, 2002, Employer owner Roger Hughes allegedly exposed his genitalia to picketers. During subsequent picketing, the Union and/or Northern California Carpenters Regional Council of Carpenters (CRC) distributed four handbills, one of which concerned the March 22 incident and is the subject of the state court lawsuit in this case.

The handbill at issue was two-sided and referred to the March 22 incident where Roger Hughes allegedly exposed himself. The handbill was distributed inside housing subdivisions built by Christopherson Homes who contracted with the Employer. The front of the handbill stated, in part, that a police report was filed against Roger Hughes for indecent exposure and quoted the details of the incident from the report. In addition, the front page of handbill stated: "Ask Keith Christopherson why Christopherson Homes allows Roger Hughes to work near your children." (underscored in original).

The reverse side of the handbill is the second page of a police incident report redacted to omit Hughes' name. This report stated that the incident occurred during picketing that was part of an ongoing labor dispute, but did not identify what the labor dispute was, or that the picketing related to area standards. Neither side of the handbill identified the Union or the CRC, nor who created the handbill. CRC employee Munoz admittedly created the

handbill, and CRC employees Hadzess and Hart admittedly distributed it in around July 2002 inside housing subdivisions built by Christopherson Homes.

In June and November 2002, the picket line incidents giving rise to the complaint in Roger Hughes I occurred. That complaint alleged that the Employer violated Section 8(a)(1) when Employer representatives physically assaulted pickets, and unlawfully threatened to cause the arrest and did cause the arrest of a Union representative picket. On June 13, 2003, the ALJ issued his decision finding that one assault and the arrest incident occurred but recommending dismissal of all allegations because the Employer's actions were not retaliatory and no statutory employees witnessed the threat to arrest or the arrest of the Union representative picket.<sup>3</sup> The complaint had not alleged that Roger Hughes' lewd conduct on March 22, 2002 was an unfair labor practice. However, that incident was litigated and found by the ALJ to have occurred as described by the Union.

The ALJ also considered the handbills that the Union distributed in connection with the Employer's contention that the picketing at issue in the case was unprotected. The Employer argued that the handbill about the alleged lewd incident belied any protected object to the picketing because it did not protest any failure to pay area standards but instead was "designed to inflame the Employer and harm its reputation in the community."<sup>4</sup> The ALJ found to the contrary that the area standards picketing was protected. The ALJ noted that the Union's other handbills did contain an area standards message; the Employer presented no evidence that the lewd conduct handbill was false; and Roger Hughes failed to deny the conduct described in that handbill.<sup>5</sup>

On July 15, 2003, the Employer filed a complaint in California Superior Court against Carpenters 46 Northern California Counties Conference Board,<sup>6</sup> CRC, the Union, and employee Hart, and then amended the complaint to include as defendants employees Munoz and Hadzess. Based on the distribution of the handbill, the state court suit alleged

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<sup>3</sup> As noted *infra*, the Board disagreed with the ALJ's rationale for dismissal and found the violation. See id.

<sup>4</sup> See id., slip. op. at 12 n.31.

<sup>5</sup> See id.

<sup>6</sup> The complaint against this defendant was subsequently dismissed from the complaint, and Carpenters 46 is not a Charging Party in this matter.

causes of action for libel, intentional and negligent infliction of emotional distress, and intentional interference with prospective economic advantage. The complaint was then amended to add causes of action for invasion of privacy (public disclosure of private facts), invasion of privacy (placing person in false light in public eye), and a violation of California Civil Code Section 1798.53 (invasion of privacy and intentional disclosure of personal information). The suit explicitly alleged that the defendants had acted with malice.

During the state court action, the parties litigated whether Hughes had actually exposed himself; whether the handbill also was distributed to the Employer's business clients and colleagues who called Roger Hughes to discuss whether he had done what he was accused of; and any damages he suffered. The Employer argued that Roger Hughes had not exposed himself, but rather merely simulated urinating on a Union jacket. The defendants' various answers and motions for summary judgment in the state court action raised, in part, preemption under the NLRA. After discovery, the Court dismissed the Union's motion for summary judgment.

On March 31, 2005, the Board issued a decision in Roger Hughes I reversing the ALJ and holding that the Employer violated Section 8(a)(1). In finding that the Employer interfered with protected conduct by threatening and causing the arrest of a picketer engaged in area standards picketing, the Board relied, in part, on the March 22 incident. The Board stated:

"a fair inference could be drawn that [Employer] was actually attempting to interfere with the Union's lawful picketing" [citations omitted]. Moreover, we believe that inference is buttressed by the evidence of both Roger and Ryan Hughes' animosity towards the Union's picketing, including Roger Hughes' swearing at and **engaging in lewd conduct in front of the pickets**. Thus, contrary to the judge, we find that the evidence clearly establishes a causal relationship between the Employer's conduct and the Union's protected area standards picketing." Id., slip. op. at 3 (emphasis added).

Thus, the Board relied upon the March 22 incident as additional "buttressing" evidence of retaliatory motive.

Because the Employer did not except to the ALJ's conclusion that the picketing and distribution of handbills

had an area standards objective,<sup>7</sup> the Board did not discuss the ALJ's analysis of the Union handbill and the Employer's claim at trial that the Union's picketing lacked such an object. The Board is seeking enforcement of this decision in the Ninth Circuit and the Employer has filed a cross-petition for review.

On August 11, 2005, a 7-day jury trial commenced in the Employer's state court suit. On August 26, 2005, the jury issued a general verdict finding that Roger Hughes was entitled to damages from Hadzess, Hart, Munoz and CRC but not the Union. The jury awarded \$99,970 in actual damages to Hughes. The jury also concluded that Hughes was entitled to punitive damages from Hadzess, Hart, Munoz, and CRC because they acted with malice, oppression, or fraud and found that these parties, but not the Union, violated California Civil Code Sec. 1798.53 in publicly disclosing a police report.

On August 31, 2005, after the second phase of the trial, the jury issued a general verdict in the amount of \$1 million to Roger Hughes in punitive damages and \$450,000 in exemplary damages for violation of California Civil Code Section 1798.53. The Employer reports, however, that the trial judge ruled that the individual defendants Hadzess, Hart, and Munoz could not be personally liable for money damages. According to the Employer, it plans to file post-trial motions and if necessary, appellate papers addressing issues such as the status of the Union, and the personal liability of Hadzess, Hart, and Munoz. The Employer also reports that it believes the defendants intend to file post-trial motions and appeals.

#### **ACTION**

We conclude that the Region should dismiss the instant charges, absent withdrawal, because the suit was reasonably based and also was not retaliatory against Section 7 rights but was directed at conduct not protected by the Act. The Employer's state court suit also was not an unlawful collateral attack on the Board's decision in Roger Hughes I because the state court's implicit finding of simulated lewd conduct in front of the picketers is essentially the same "buttressing" evidence of retaliatory motive relied upon in the Board case.

In Bill Johnson's, the Supreme Court held that First Amendment considerations insulate the filing and prosecution of a reasonably based lawsuit from being enjoined as an

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<sup>7</sup> See id., slip. op. at 2.

unfair labor practice, even if the lawsuit was filed to retaliate against protected activity.<sup>8</sup> The Court held that the Board cannot ordinarily halt the ongoing prosecution of a lawsuit unless: (1) the lawsuit lacks a reasonable basis in fact or law; and (2) the plaintiff filed the suit with a motive to retaliate against rights protected by the Act.<sup>9</sup> Thus, even if a lawsuit is not well-based, it must also attack the exercise of Section 7 rights or be shown to have a reasonable tendency to restrain or coerce employees in the exercise of Section 7 rights in order to violate the Act as an unlawful lawsuit.<sup>10</sup>

Here, the suit against the non-Union defendants appears reasonably based as it survived motions for summary judgment and was found meritorious by the jury, which issued a verdict finding those defendants liable. The state suit allegations against the Union also appear well-based. Although the jury found that the Union was not liable, the suit raised sufficient factual questions such that, after discovery, the court denied the Union's motion for summary judgment. In Bill Johnson's, the Supreme Court suggested that, in determining whether a lawsuit has a reasonable basis, the Board may draw guidance from the standards used in ruling on motions for summary judgment and directed verdict.<sup>11</sup> Accordingly, we have argued that a lawsuit was reasonably based where it had survived a motion for summary judgment.<sup>12</sup> We find the same conclusion is appropriate here.

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<sup>8</sup> 461 U.S. at 740-744.

<sup>9</sup> See id. at 731, 742-743.

<sup>10</sup> See, e.g., Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 133, 137-138 (1995) (although district court was preempted from adjudicating the union's claims that the Board had incorrectly decided voter eligibility questions in a representation proceeding and that the employer had violated a Stipulated Election Agreement, the suit was not an unfair labor practice because it was directed at the Board and the employer, not at employees and pursuit of the suit did not restrain or coerce Section 7 rights).

<sup>11</sup> See Bill Johnson's Restaurants v. NLRB, 461 U.S. at 745 n.11.

<sup>12</sup> See Ray Angelini, Inc., Case 4-CA-24904, General Counsel's Position Statement to the Board on Remand, January 16, 2003.

Furthermore, we conclude that the suit does not violate Section 8(a)(1) because it is not retaliatory against Section 7 conduct and would have no impact upon the exercise of Section 7 rights. The suit attacks only the handbill publicizing Roger Hughes' alleged exposure. The defendants argued the handbill was protected labor speech but the Employer's lawsuit was properly before the state court as the Employer pled that it was an unprotected false statement made with malice<sup>13</sup> and the Board had not found it protected.<sup>14</sup> Since the jury concluded that the defendants were liable, the jury implicitly found that the statement was false, i.e., Roger Hughes did not actually expose himself, and that the handbill was unprotected under the Linn standard of "actual malice." The state court thus found that this handbill was a malicious tort and not protected; the Board never found to the contrary that this handbill was protected. We therefore conclude that the suit did not attack Section 7 conduct nor retaliate against the exercise of Section 7 rights.<sup>15</sup>

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<sup>13</sup> State law defamation claims may not lie against statements made in the context of a labor dispute, except in those instances in which the plaintiff can show that the statements lost their otherwise protected status because they were made with "actual malice," i.e., with knowledge of their falsity or reckless disregard of whether they were true or false. See Linn v. Plant Guard Workers, 383 U.S. 53 (1966); New York Times v. Sullivan, 376 U.S. 254 (1964).

<sup>14</sup> The ALJ found only that this handbill did not vitiate the Union's otherwise protected area standards conduct shown by the Union's other handbills. See Roger Hughes I, 344 NLRB No. 44, slip op. at 12, n. 31. Since the Employer filed no exceptions to this conclusion, the Board was not presented with that question. In any event, it is clear that neither the ALJ nor the Board found that this handbill constituted protected activity.

<sup>15</sup> Although the law suit is not yet concluded, we note that the suit is not unlawful under the heightened retaliatory motive test described in the BE & K majority opinion as applicable to reasonably based lawsuits. See BE & K Construction Co. v. NLRB, 536 U.S. 516, 536-537 (2002) (O'Connor concurring). There is no evidence that the Employer would not have filed the suits "but for a motive a motive to impose the cost of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity." The Region notes that the evidence shows that customers and clients called Roger Hughes after receiving the flyer to find out if he had engaged in the lewd acts described therein, and that he was very angry and embarrassed when he first read the flyer. Thus, the

Finally, the Charging Parties also argue that the suit is unlawful as a collateral attack on Roger Hughes I's finding that Employer owner Hughes engaged in the alleged lewd exposure. In the state court proceeding, the Employer argued, and the jury implicitly found, that Roger Hughes did not expose himself, but merely simulated urinating on a Union jacket. This factual discrepancy is immaterial, however, to the Board's decision. Either version of the incident - the Union's lewd exposure or the Employer's simulation - would demonstrate the Employer's hostility to the Union and would constitute the same "buttressing" evidence of retaliatory motive. We therefore conclude that the state court suit was neither inconsistent with, nor a collateral attack on, the prior Board decision.

B.J.K.

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evidence supports the contrary conclusion that the Employer filed the state suit to clear Hughes' name of any association with or implication of child molestation.